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In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION,
PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by suspending and discharging one employee and reprimanding another because of their union activities.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 2

Statement 2

Argument 7

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Blaw-Knox Foundry & Mill Machinery, Inc. v. *NLRB*, 646 F.2d 113 10

Climax Molybdenum Co. v. *NLRB*, 584 F.2d 360 10

Krispy Kreme Doughnut Corp. v. *NLRB*, 635 F.2d 304 10

Limestone Apparel Corp., 255 N.L.R.B. 722, enforced, 705 F.2d 799 9

NLRB v. *Transportation Management Corp.*, No. 82-168 (June 15, 1983) 8, 9

NLRB v. *Washington Aluminum Co.*, 370 U.S. 9 10

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 9

Wright Line, Inc., 251 N.L.R.B. 1083, enforced, 662 F.2d 899, cert. denied, 455 U.S. 989 ..... 7, 8, 9

Page

Statute:

National Labor Relations Act, 29 U.S.C. *et seq.* :

§ 7, 29 U.S.C. 157 ..... 2, 5, 6, 7, 8, 9, 10

§ 8(a)(1), 29 U.S.C. 158(a)(1) 2, 5, 6, 7

§ 8(a)(3), 29 U.S.C. 158(a)(3) 2, 5

§ 10(c), 29 U.S.C. 160(c) 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 732 F.2d 754. The decision and order of the National Labor Relations Board (Pet. App. A1) and the decision of the administrative law judge (Pet. App. A2) are reported at 253 N.L.R.B. 1153.

JURISDICTION

The judgment of the court of appeals was entered and a petition for rehearing was denied on June 1, 1984 (Pet. App. C). The petition for a writ of certiorari was filed on August 7, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Sections 8(a)(1) and 10(c) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and 160(c), are set forth at Pet. 2-3. Section 7 of the Act, 29 U.S.C. 157, provides in pertinent part:

> Employees shall have the right to * * * engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), provides in pertinent part:

> (a) It shall be an unfair labor practice for an employer —
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

STATEMENT

1. Petitioner is a corporation that provides electric power to communities in Colorado. The International Brotherhood of Electrical Workers, Local 111 (the Union) represents petitioner's production and maintenance employees. In early 1979, petitioner's office employees began a campaign to obtain representation by the Union (Pet. App. A2, at 17).[1] Clerical worker Kathleen Gunton approached the Union on behalf of the office employees. The Union held several meetings at the home of Katherine Tate, secretary to petitioner's director of engineering, Mike Deans. Gunton and Tate solicited signatures on union authorization cards at the meetings and at work, and Gunton submitted the cards to the Union. Tate's and Gunton's active union involvement was "common knowledge" to petitioner. *Id.* at 27, 35. Tate's union activities were "a source of discomfort"

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[1]All dates referred to are in 1979 unless otherwise noted.

to Deans; he felt that they were incompatible with her duties as his secretary and that she either had to agree not to join the Union or be terminated (*ibid.*).

The Union won an election among the office employees on April 13. Petitioner unsuccessfully challenged Tate's inclusion in the bargaining unit both before and after the election on the ground that she was a confidential employee (Pet. App. A2, at 36). In late June, Deans' supervisor instructed him to keep track of errors in Tate's typing (*id.* at 35). Just prior to that time, Deans had stated in a letter of recommendation that Tate performed her duties "in a highly efficient and professional manner" and was considered to be "a very productive and valuable employee" (*id.* at 35 n.19).

On July 3, Tate was serving as relief switchboard operator in the reception area under the supervision of Spencer Cronk. Several employees were joking with Cronk at the time over a bag of spoiled food that an irate customer had left in the area. Tate asked Cronk to take the food with him when he left, and said that if he did not she would put it on his desk. Cronk responded that he did not "carry out trash" and, after the two exchanged a few more quips, Cronk said, "go ahead and have a wildcat walkout." Tate pretended to start to leave, but when the switchboard began to ring she returned to answer the call, then called a janitor to pick up the trash and finished her shift. Pet. App. A2, at 29-30. Cronk left the area and continued to exchange jokes with employees about the spoiled food (Tr. 74, 273, 569).[2]

Later that day, Cronk became "somewhat upset" over the incident and reported it to Deans (Pet. App. A2, at 30). Deans called Tate into his office and told her that he was

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[2]"Tr." refers to the transcript of the hearing before the administrative law judge.

thinking of suspending her, and that he would talk to Cronk again and get back to her (*ibid.*). After leaving Deans' office, Tate told Gunton that she was afraid she would be suspended, and she asked Gunton to be present when she reported back to Deans (*id.* at 24). Shortly after 5:00 p.m., Deans called Tate into his office; Gunton waited outside, where she could see and hear what was happening through the open door (*ibid.*). Deans told Tate that he had been unable to locate Cronk but that he did not feel he could delay her suspension (*id.* at 30-31). At that point Gunton asked Tate whether she wanted a witness and Tate indicated that she did. Gunton then entered the room and asked Deans whether they could locate Cronk so that Tate's status could be clarified. Deans answered no, and told Gunton to "get the hell out" and Tate that there was "[nothing] he could do for her." Gunton and Tate then left. *Id.* at 24-26, 30-31; Tr. 129-130, 235.

On July 5, Cronk gave Tate a three-day suspension. The suspension notice stated that Tate "made remarks and suggestions which I regard as acts of insubordination and disrespect for your supervisor * * *. Your conduct * * * was unbecoming * * * and is regarded by me as a most serious breach of the standard that is expected of our employees." Pet. App. A2, at 31. The next day, Gunton's supervisor gave her an official reprimand stemming from the incident in Dean's office. The reprimand stated that "employees * * * are not authorized to visit other areas of the office building after working hours unless they have authorization or official business to conduct." *Id.* at 25-26. Gunton's was the only written reprimand ever issued on the basis of such conduct, although other employees were often in the building away from their work stations after hours (*id.* at 27, 29).

When Tate returned from her suspension on July 10, she gave Deans a note from her doctor "strongly" recommending that she be given a one-week leave of absence "because

of health problems" (Pet. App. A2, at 32). Deans took the note to Stanley Lewandowski, petitioner's general manager, who called Tate's clinic to verify the note's authenticity but "made no effort to speak with the doctor or otherwise ascertain the nature or seriousness of Tate's condition" (*ibid.*). Deans told Tate that her request for leave was denied and that she would "probably be fired" if she failed to appear for work. Tate said that she would follow her doctor's orders, and left work for one week. When she reported for work on July 18, she was notified that she had been terminated "for being absent from work without proper authorization." *Id.* at 32-34.

2. The Board, adopting the findings and conclusions of the administrative law judge, found that petitioner had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by suspending and discharging Tate and reprimanding Gunton in retaliation for their union activities, and that Gunton's reprimand independently violated Section 8(a)(1) because her conduct was protected by Section 7 of the Act, 29 U.S.C. 157 (Pet. App. A1, at 1-2; Pet. App. A2, at 27-29, 36-39). In light of petitioner's demonstrated opposition to the Union, the Board found that petitioner "was intent upon building a case against Tate, giving colorable validity to a later imposition of sanctions" (*id.* at 37). It concluded that the spoiled-food incident had been viewed by all involved, including Cronk, as simply "general merriment" not "of a seriousness warranting any kind of discipline," and that petitioner's reliance on it as the ground for Tate's suspension was merely a "pretext to punish her for her union involvement" (*ibid.*). Similarly, the Board found that petitioner had an "ulterior motive" for discharging Tate and that "the stated reasons for denying the leave of absence are unconvincing, indicating that the denial was in the expectation that Tate nevertheless would follow the doctor's recommendation[,] thereby presenting

[petitioner] with a sure-fire chance to terminate her" (*id.* at 37-38).[3]

With respect to Gunton's reprimand, the Board found that it was in retaliation for her union activity and that petitioner's asserted reliance on its unenforced rule against visiting other areas of the office after hours "betrays pretext" (Pet. App. A2, at 29).[4] The Board also found that the reprimand independently violated Section 8(a)(1) because it was prompted by Gunton's protected conduct "for the purpose of * * * mutual aid or protection" under Section 7 in responding to Tate's request for assistance at the disciplinary interview with Deans (Pet. App. A2, at 27-28). The Board ordered that Tate be offered reinstatement with back pay and that Gunton's reprimand be expunged from her personnel file (Pet. App. A1, at 3-4).[5]

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[3]Petitioner's stated reasons for denying Tate's sick-leave request were that Deans could not spare her because work had accumulated during her suspension, and that he and Lewandowski doubted Tate's sincerity in claiming a health problem (Pet. App. A2, at 32). The Board found that the backlog of work was not a legitimate reason for denying the request because it was created by petitioner's unlawful suspension of Tate (Pet. App. A1, at 2 n.1). The Board also found that any concern over Tate's veracity was unconvincing in light of Lewandowski's failure to inquire of the clinic as to Tate's condition (Pet. App. A2, at 37). The Board also rejected petitioner's defense that Tate was a confidential employee, noting the two earlier determinations to the contrary (see page 3, *supra*) and concluding that even if she were a confidential employee, she would still be entitled to protection under the Act against discrimination due to her union activities (Pet. App. A2, at 36 n.20).

[4]The Board noted petitioner's "unconvincing" efforts to prove the existence of such a rule, its "hyperbole" in asserting that Gunton's conduct was "inexcusable" and a "major" offense, and the unusually close involvement of petitioner's general manager, who did not ordinarily take part in disciplinary matters (Pet. App. A2, at 28-29 & n.16).

[5]The Board also found that petitioner had committed numerous other unfair labor practices, by unilaterally abrogating a pension plan dividend provision in the collective bargaining agreement with production and maintenance employees, failing to comply with the Union's

3. The court of appeals, on a petition for review and cross-application for enforcement, found that substantial evidence supported the Board's findings as to both Tate and Gunton (Pet. App. B, at 7-11, 16-20). It upheld the Board's conclusions that petitioner's proferred reasons for its actions were pretextual and that petitioner's sole motive was to punish the employees for their union involvement (*id.* at 10, 19). Accordingly, the court rejected petitioner's contention that the Board had erred by failing to state its findings in terms of the *Wright Line* [6] analysis applicable to dual-motive discharges (Pet. App. B, at 10-11, 19). The court also upheld the Board's finding that Gunton's conduct in support of Tate constituted concerted activity protected by Section 7, and that the reprimand therefore violated Section 8(a)(1) for this reason as well (Pet. App. B, at 16-17). The court enforced the Board's order with respect to Gunton, but remanded to the Board for specific findings with respect to whether Tate was an employee with access to confidential labor relations information and, if she was, whether she nonetheless would be protected by the Act (Pet. App. B, at 11-15).[7]

ARGUMENT

Relying on a version of events that the Board discredited and on inferences that it rejected, petitioner contends (Pet.

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request for information concerning that action, interrogating an employee concerning the office workers' union campaign and threatening that there would be no raises due to the campaign and that she would probably get a raise only if the Union lost, and issuing memoranda indicating that the Union's victory was futile and would cause employees economic harm (Pet. App. A2, at 2-23, 38-39).

[6] *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

[7] The court enforced the Board's order based on the violations found with respect to the other unfair labor practices found by the Board (see note 5, *supra*). Petitioner does not request review of this aspect of the court's decision.

8-16) that the Board erred by failing expressly to apply its *Wright Line* analysis applicable to dual-motive discharges and by concluding that Gunton's conduct was "concerted activity" protected by Section 7. These fact-bound contentions were properly rejected by the court of appeals in a decision that does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.[8]

1. In *NLRB* v. *Transportation Management Corp.*, No. 82-168 (June 15, 1983), this Court approved the Board's allocation of proof set forth in *Wright Line* for determining the lawfulness of discipline of an employee engaged in union activity in dual-motive cases, that is, where the employer's action may have been taken at least in part for lawful reasons. Under this approach, where an employer's opposition to union activity is shown to be a motivating factor in its decision to take disciplinary action, that action will be found to constitute an unfair labor practice unless the employer demonstrates that the action would have taken place even in the absence of the forbidden motive. *NLRB* v. *Transportation Management Corp.*, slip op. 7-10. But where, as here, the employer's proferred lawful reason for its action is merely a pretext to disguise an unlawful motive, the inquiry is logically at an end, without any need to engage in the more refined analysis applicable when both lawful and unlawful factors contributed to the employer's decision:

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[8]Because the court of appeals declined to enforce the Board's order with respect to Tate's suspension and discharge and remanded to the Board for further consideration of petitioner's confidential-employee defense (see page 7, *supra*), petitioner's *Wright Line* argument with respect to Tate is not yet ripe for review by this Court. Since the argument is identical to petitioner's claim with respect to Gunton, however, we will address them both at this time.

> [A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.

Limestone Apparel Corp., 255 N.L.R.B. 722, 722 (1981), enforced, 705 F.2d 799 (6th Cir. 1982); see *NLRB* v. *Transportation Management Corp.*, slip op. 7 n.5.

Petitioner's argument that the Board erred by failing to apply *Wright Line* thus rests entirely on the claim that the findings of pretext were not supported by substantial evidence.[9] This factual issue does not warrant the Court's review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as the facts already set forth (pages 2-5, *supra*) demonstrate, there was ample support in the record for the Board's conclusion that petitioner's stated reasons for its actions were pretextual.

2. The question whether Gunton's assistance of Tate in connection with her suspension constitutes protected conduct under Section 7 is of no practical importance in this case, as the Board found that the reprimand independently violated the Act because it was motivated by Gunton's activities on behalf of the union. The remedy imposed for the two violations is identical. See Pet. App. B, at 20 n.16.;

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[9]The cases relied upon by petitioner (Pet. 11-14) are inapposite because they did not involve pretext. In each of the cases cited, the record established that the employer actually relied on lawful reasons in taking adverse action against the employee. Petitioner's reliance (Pet. 8-9) on cases in which the Court vacated and remanded for reconsideration in light of *Transportation Management Corp.* is obviously misplaced. Those were cases in which the courts of appeals had held the Board to a more stringent burden of proof than its own *Wright Line* approach requires. Accordingly, after this Court approved the *Wright Line* standard, it granted the Board's petitions and directed the courts of appeals to apply the correct legal rule.

Pet. App. A2, at 27-28, 40, 42. In any event, the court of appeals correctly upheld the Board's determination that Gunton's conduct was protected by Section 7. See generally *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 14-17 (1962) (Section 7 protects not only union-related activities but other concerted activities for mutual aid and protection as well).[10]

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[10]Petitioner attempts to avoid the settled interpretation of Section 7 by portraying Gunton's conduct as merely an isolated act of insubordination unrelated to Tate's situation. This view of the facts is completely at odds with that adopted by the Board. As we have shown (pages 4, 6 *supra*), the Board found that Gunton's presence at the interview with Deans was in response to Tate's request, and was for the sole purpose of assisting Tate with respect to the proposed suspension. The cases cited by petitioner (Pet. 15-16) are inapposite. In *Krispy Kreme Doughnut Corp.* v. *NLRB*, 635 F.2d 304, 305-308 (4th Cir. 1980), and *Blaw-Knox Foundry & Mill Machinery, Inc.* v. *NLRB*, 646 F.2d 113, 114-116 (4th Cir. 1981), the employees had acted individually and for purely personal reasons, not on behalf of other employees. In *Climax Molybdenum Co.* v. *NLRB*, 584 F.2d 360, 361-364 (10th Cir. 1978), a union representative asked to meet with two employees on company time for the express purpose of directing them not to cooperate with an investigation, even though the employees had not requested his assistance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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